

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 11, 2013 appellant, then a 26-year-old mail carrier, filed a traumatic injury claim (Form CA-1), alleging that he injured his left leg and lower back while stepping out of a mail vehicle while in the performance of duty. He did not stop work.

In a January 14, 2013 report, Dr. Amar Bains, a specialist in family medicine, noted that appellant pulled a muscle at work when he stepped out of his truck, set his foot on the ground the wrong way, and felt a sudden, sharp pain in his left lower lumbar region that radiated down his left leg. He diagnosed sciatica and radiculitis.

In a February 7, 2013 report, Dr. Bains noted that appellant underwent a lumbar magnetic resonance imaging (MRI) scan which revealed a left paracentral L5-S1 disc herniation, compressing the left S1 nerve root and causing a slight indentation on the thecal sac. The MRI scan also showed a plus facet arthrosis, resulting in minimal foraminal encroachment, with a small left paracentral L4-5 disc herniation which slightly impressed the thecal sac. Dr. Bains opined that this was a work-related injury and he diagnosed sciatica, radiculitis, and multiple disc herniations.

By decision dated April 12, 2013, OWCP denied appellant's claim, finding that he failed to submit sufficient medical evidence in support of his claim that he sustained left leg and lower back injuries causally related to the accepted January 11, 2013 employment incident.

On August 12, 2013 appellant requested reconsideration of the April 12, 2013 decision.

In a July 10, 2013 report, Dr. Jeffrey Nees, a specialist in neurosurgery, noted that he had been treating appellant for low back pain since June 3, 2013. He indicated that appellant sustained a work injury in January 2013 when he stepped out of his mail truck, planted his foot, and experienced pain in the left side of his back, which radiated down his left leg. Dr. Nees noted that he had performed a left L5-S1 discectomy and opined that the injury to appellant's back was directly related to his work. In a September 6, 2013 addendum to the July 10, 2013 report, he diagnosed displacement of lumbar intervertebral disc without myelopathy, spinal stenosis in the cervical region, and displacement of cervical intervertebral disc without myelopathy. Dr. Nees opined that appellant's injury was the direct and proximate cause of his diagnosed neck and back conditions.

By decision dated December 4, 2013, OWCP denied modification of the April 12, 2013 decision.

On February 3, 2014 counsel requested reconsideration of the December 4, 2013 decision and he resubmitted Dr. Bains' January 14, 2013 report.

By decision dated February 25, 2014, OWCP denied modification of the December 4, 2013 decision.

Appellant appealed OWCP's December 4, 2013 and February 25, 2014 decisions to the Board. By decision dated August 21, 2014,³ the Board affirmed OWCP's December 4, 2013 and February 25, 2014 decisions.

By letter dated May 11, 2015, counsel requested reconsideration. In a February 17, 2015 report, Dr. Nees essentially reiterated his previous stated findings and conclusions.

By decision dated May 18, 2015, OWCP denied appellant's request for reconsideration as it neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to require OWCP to review its prior decision. It found that Dr. Nees' February 17, 2015 report was cumulative and duplicative of his previously submitted July 10, 2013 report.

On August 14, 2015 counsel again requested reconsideration.

In an undated report, Dr. Nees opined that there was clear evidence of a cause and effect relationship between appellant's stepping down from his mail truck and the onset of his back and left leg pain. He reasoned that the force of appellant's body weight coming down on his leg transmitted sufficient force to his L5-S1 disc that some of the interior disc material was forced out through the annulus fibrosus, resulting in his nerve impingement and subsequent pain. Dr. Nees advised that appellant did not have back problems prior to the January 11, 2013 work incident. He opined that appellant suffered a left L5-S1 disc herniation stepping down out of his mail truck on January 11, 2013.

By decision dated August 21, 2015, OWCP denied modification. It found that, while Dr. Nees explained in his August 13, 2015 report the physiological changes that occurred in disc herniation/impingement, he did not explain the etiology as to how the specific employment event caused the diagnosed condition.

Appellant appealed OWCP's August 21, 2015 decision to the Board. In an October 12, 2016 decision,⁴ the Board set aside OWCP's August 21, 2015 decision and remanded the case to OWCP for further evidentiary development necessitated by the medical evidence produced by Dr. Nees. The Board noted that the medical evidence of Dr. Nees was not fully rationalized on the matter of causal relationship between a diagnosed condition and the January 11, 2013 employment incident, but it found that it was sufficient to require such development, to be followed by the issuance of a *de novo* decision.

On remand OWCP requested that Dr. Nees provide a supplemental report regarding appellant's claimed January 11, 2013 employment injury. However, Dr. Nees did not respond within the time allotted by OWCP.

In a January 20, 2017 decision, OWCP denied appellant's claimed January 11, 2013 employment injury. It found that he failed to submit a rationalized medical report sufficient to

³ Docket No. 14-1123 (issued August 21, 2014).

⁴ Docket No. 16-0492 (issued October 12, 2016).

establish causal relationship between a diagnosed medical condition and the January 11, 2013 employment incident.

In a February 2, 2017 facsimile transmission, counsel requested a telephonic oral hearing with a representative of OWCP's Branch of Hearings and Review.

In a February 17, 2017 decision, an examiner from OWCP's Branch of Hearings and Review, determined that appellant was not entitled to a hearing as a matter of right because he had previously requested reconsideration of his claim. The examiner indicated that she had, in her discretion, carefully considered appellant's request and had determined that the request was denied for the reason that the issue of the case could equally well be addressed by requesting reconsideration and submitting probative evidence in support of the claim for a January 11, 2013 employment injury.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁵ Section 10.615 of OWCP's federal regulations, implementing this section of FECA, provides that a claimant who requests a hearing can choose between two formats, either an oral hearing or a review of the written record by an OWCP hearing representative.⁶ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁷ The date of filing is fixed by postmark or other carrier's date marking.⁸

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.⁹ Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing,¹⁰ when the request is made after the 30-day period for requesting a hearing,¹¹ when the request is for a second hearing on the same

⁵ 5 U.S.C. § 8124(b)(1).

⁶ 20 C.F.R. § 10.615.

⁷ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

⁸ *See* 20 C.F.R. § 10.616(a).

⁹ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁰ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹¹ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

issue,¹² and when the request is made after a reconsideration request was previously submitted.¹³ In these instances, OWCP will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.¹⁴

ANALYSIS

Appellant's February 2, 2017 request for a hearing was made after he had previously requested reconsideration of prior OWCP decisions concerning his claim for a January 11, 2013 employment injury. He had previously requested reconsideration of OWCP's decisions denying his claim for a January 11, 2013 employment injury on several occasions, including through reconsideration requests made in August 2013, February 2014, and May and August 2015. Hence, the Board finds that appellant was not entitled to a hearing as a matter of right.¹⁵

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP, in its February 17, 2017 decision, properly exercised its discretion by indicating that it had considered appellant's request and had determined that the request was denied for the reason that the issue of the case could equally well be addressed by requesting reconsideration and submitting probative evidence in support of the claim for a January 11, 2013 employment injury. The Board has held that as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.¹⁶ In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a hearing under section 8124 of FECA.

¹² *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹³ *R.H.*, Docket No. 07-1658 (issued December 17, 2007); *S.J.*, Docket No. 07-1037 (issued September 12, 2007). Section 10.616(a) of OWCP's regulations provides that the claimant seeking a hearing must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. 20 C.F.R. § 10.616(a).

¹⁴ *See supra* note 10.

¹⁵ *See supra* note 13.

¹⁶ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board